SUPREME COURT, U.S.
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(1) 88-451

No.

In The

Supreme Court of the United States

October Term, 1988

PETER E. HORRIGAN,

Petitioner,

vs.

GENERAL DYNAMICS CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

This petition raises a question of first impression where the Court of Appeals for the First Circuit denied enforcement of a decision of the Benefits Review Board of the Department of Labor which reversed the findings of an administrative law judge, and declined to limit attorney fees only to work performed on issues in which the claimant prevails.

STATEMENT REQUIRED BY RULES 28.1 AND 21.1(b)

The petitioner, Peter E. Horrigan, was a claimant and respondent below.

The respondent, General Dynamics Corporation, petitioned for review of a decision and order of the Benefits Review Board. The other respondent in the action below, not a petitioner, is the Director of the Office of Workers' Compensation Programs of the United States Department of Labor.

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No.

In The

Supreme Court of the United States

October Term, 1988

PETER E. HORRIGAN,

Petitioner,

v.

GENERAL DYNAMICS CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner seeks a writ of certiorari to review an order of the United States Court of Appeals for the First Circuit in which it denied enforcement of the order of the Benefits Review Board and remanded the case with instructions to accept the findings of the administrative law judge.

OPINIONS BELOW

The opinion of the Court of Appeals is reprinted beginning

at page 1a of the Appendix. The decision and order of the Benefits Review Board is reprinted beginning at 12a of the Appendix. The decision and order awarding benefits of the administrative law judge is reprinted beginning at page 18a of the Appendix; the supplemental decision and order granting attorney's fee of the administrative law judge is reprinted beginning at page 37a of the Appendix.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was rendered on June 8, 1988 (1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

33 U.S.C. § 928(a) states:

> If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the deputy commisioner, on the ground that there is no liability for compensation within the provisions of this Act, and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of this claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier in an amount approved by the deputy commissioner, Board, or court, as the case may be, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final.

STATEMENT OF THE CASE

The underlying action emanates from an appeal by the General Dynamics Corporation from a final order of the Benefits Review Board of the Department of Labor awarding attorney's fees to petitioner Peter E. Horrigan for work performed on an unsuccessful claim of retaliatory discharge or a "Section 49" claim [33 U.S.C. § 948(a)]. Employer alleged jurisdiction based on 33 U.S.C. § 921(c) of the Longshoreman and Harbor Workers' Compensation Act (the "Act").

Petitioner Peter E. Horrigan filed claims under the Act for disability benefits as well as a retaliation claim for employment discrimination because of filing claims for disability benefits.

Subsequent to a hearing, the administrative law judge awarded the petitioner disability benefits, but denied the § 49 claim (18a).

Prior to ruling on petitioner's application for an attorney's fee and expenses in the amount of $17,891.40, the administrative law judge requested written arguments from both parties concerning whether or not the fee requested is effected by the denial of the retaliatory discharge claim.

Subsequent to receiving the requested information, the administrative law judge issued a supplemental decision and order granting attorney's fee in the amount of $8,634.01, as a reasonable fee for prosecuting the compensation claim, and denied any fee for services and expenses incurred in connection with the retaliatory discharge claim (37a).

Petitioner timely appealed to the Benefits Review Board. The Benefits Review Board affirmed the administrative law judge's decision and order awarding benefits, but modified the supplemental decision and order granting attorney's fee. In so

doing, the Board found that it was improper for the administrative law judge to limit the fee only to work performed on issues on which a claimant prevails. The Board thereby modified petitioner's fee to $13,891.40 (12a).

General Dynamics Corporation appealed the decision and order of the Benefits Review Board to the United States Court of Appeals for the First Circuit, which described the case as one of first impression (6a). On June 8, 1988, the Court of Appeals concluded that "the determination of the Administrative Law Judge must be accorded a broad degree of deference" (11a), and thereby denied enforcement of the Benefits Review Board's order and remanded the case with instructions to accept the findings of the administrative law judge (11a).

REASONS FOR GRANTING THE WRIT

The specific question presented in this petition is whether or not it is proper under the Longshoreman and Harbor Workers' Compensation Act to limit attorney's fees and expenses only to work performed on issues in which the claimant prevails.

The necessity of resolving this issue is evidenced in the words of the Court of Appeals which stated, "we are the first appellate court to reach this precise issue. Therefore we are working on a blank slate." (6a).

As such, the court was forced to refer back to similar cases which had been decided by the Benefits Review Board and in so doing found only two, both of which affirmed an award of fees on issues which were not successful.

Nonetheless, the Court of Appeals denied enforcement of fees and expenses on the unsuccessful claim in the case at hand.

Thus, the first and foremost reason for granting the writ would be to resolve this issue. Both the lack of case law at the appellate level and the divergence from the case law established at the administrative level necessitate that such a fundamental question be resolved by this Court.

Secondly, the decision of the Court of Appeals for the First Circuit conflicts with the principles of statutory interpretation established by the Supreme Court of the United States. The Court of Appeals acknowledges that "the applicable attorney's fee statute is not very helpful." (6a).

The statute reads in part:

> If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice . . . and a person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of this claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier . . . for the claimant.

33 U.S.C. § 928(a).

Clearly, the statute does not mandate that an attorney can only receive a fee in connection with those issues which he has successfully prosecuted. Such a reading of the statute would defeat the congressional intent of relieving the injured worker of the burden of paying his fees and expenses when he prevails. The cases cited by the Court of Appeals merely reaffirm this intention.

Likewise such a reading would have a devastating effect on other sections of the Act specifically designed to protect the injured worker. Particularly, counsel may be discouraged from vigorously

pursuing a claim such as a Section 49 claim which is solely devised to prevent discriminatory discharge of an injured worker, as payment for their efforts would be so dubious.

The Court of Appeals' failure to apply the plain and unambiguous language of the statute serves to nullify the congressional intent of protecting injured workers. Furthermore, such failure conflicts with the consistent holding of the Supreme Court that the unambiguous terms of a statute are to be applied. *Garcia v. United States,* 469 U.S. 70, 75 (1984).

The issue presented in this case is fundamental to both the judicial process and to the constitutional protection against the deprivation of life, liberty or property without due process of law.

Petitioner Horrigan had a constitutionally-protected property interest in his continued employment and/or his entitlement to compensation benefits. *See Board of Regents v. Roth,* 408 U.S. 564 (1972); *Goldberg v. Kelly,* 397 U.S. 254 (1970); *Arnett v. Kennedy,* 416 U.S. 134 (1974). Protecting these interests often requires competent legal advice. Thus to limit the attorney's fees only to issues on which he prevails, has a boomerang effect. The burden will inevitably fall back on the injured worker, as his ability to secure counsel, particularly when difficult or unusual issues are involved, will be seriously hindered.

CONCLUSION

This case presents an important legal question which begs for clarification. The far-reaching and inevitable consequences will adversely affect the very group of people which the Longshoreman and Harbor Workers' Act was designed to protect. This Court should intervene now so that this group of people will continue to receive vigorous legal representation in view of the decision of the Court of Appeals.

Respectfully submitted,

WILLIAM T. SALISBURY
Counsel of Record
SALISBURY & NEELON
Attorneys for Petitioner

APPENDIX A — OPINION OF THE FIRST CIRCUIT DATED JUNE 8, 1988

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-1932

GENERAL DYNAMICS CORPORATION,

Petitioner,

v.

PETER E. HORRIGAN and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE BENEFITS REVIEW BOARD

Before

Coffin and Torruella, *Circuit Judges*,
and Fuste,* *District Judge*.

William B. Koffel with whom *Foley, Hoag & Eliot* was on brief for petitioner.

William T. Salisbury for respondent Peter E. Horrigan.

JUNE 8, 1988

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* Of the District of Puerto Rico, sitting by designation.

Appendix A

COFFIN, *Circuit Judge.* Petitioner General Dynamics Corporation appeals from a final order of the Benefits Review Board ("the Board") of the Department of Labor awarding attorney's fees to respondent Peter Horrigan for work expended on respondent's unsuccessful claim of retaliatory discharge. The Board's decision reversed the ruling of the Administrative Law Judge ("ALJ") denying fees for that claim on which respondent was wholly unsuccessful. We deny enforcement of the Board's order, and remand with instructions to accept the findings of the ALJ.

The following facts are derived from the report of the ALJ. Respondent was one of the top crane operators in petitioner's Quincy, Massachusetts shipyard. He worked for General Dynamics from about September 1966 until February 12, 1982, the date on which his employment was terminated for cause. On October 16, 1980, respondent tripped over some scrap iron in the yard and seriously re-injured his left knee and left ankle. Respondent required extensive treatment, hospitalization, and rehabilitation for both the ankle and knee. In December 1981, respondent expressed his desire to return to work, and his surgeon gave him a medical certificate indicating his ability to work again without limitations.

Respondent returned to work, not at his previous place of employment, but instead at a rival ship and engine manufacturer, believing work there would be less strenuous on his knee. This new employment lasted only three weeks, due to continued pain in respondent's knee and ankle. On January 11, 1982, respondent returned to work at General Dynamics, fully expecting to fail the physical examination and be returned to compensation status. To claimant's surprise, he passed the physical exam and was cleared for a return to work.

Appendix A

On February 2, 1982, respondent was suspended from work by petitioner. Petitioner claimed that respondent had disobeyed company rules by working for the rival concern, withholding that information from General Dynamics, and falsifying his reason for absence between December 14th and January 11th. Respondent was discharged on February 12, 1982.

Because of his continuing pain, respondent remained unemployed at least until the time of the ALJ hearing, with the exception of a three-week period during October 1982 when respondent attempted unsuccessfully to work as a rigger at another shipyard.

On April 15, 1983, respondent filed two separate claims against petitioner under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* ("the Act"). The first was a claim for disability benefits, in which respondent sought compensation for temporary total disability from the time of his discharge.[1] The other claim was made pursuant to section 49 of the Act, 33 U.S.C. § 948a, alleging that respondent was discriminatorily discharged because of his actual or threatened claim for disability compensation. We shall refer to this claim as the "Section 49 claim," or the "retaliation claim."

Petitioner moved to have separate hearings on the disability and retaliation claims, but the ALJ denied this motion for the sake of efficiency and convenience to the claimant. The claims were tried together before the ALJ.

On December 19, 1983, the ALJ ruled that the claimant had

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1. Respondent did not seek compensation for the three-week period in October 1982 when he was otherwise employed.

failed to prove temporary total disability on the first claim. The judge found, however, that claimant had suffered permanent loss of some function in his left lower extremity, and ruled that he was permanently partially disabled. Claimant was thus entitled to benefits under section 8(c) of the Act, 33 U.S.C. § 908(c). The ALJ found, however, that the employer had not discharged claimant in response to the claim for disability benefits. Instead, the ALJ found, respondent was fired because of his violations of company policy.

In a separate order, dated April 2, 1984, the ALJ awarded respondent partial attorney's fees. The ALJ granted fees for the successfully prosecuted disability claim, but denied fees on the Section 49 claim, which was "completely devoid of merit." In regard to the denial of fees for the retaliation claim, the ALJ explained:

> [I]t must be noted that the Section 49 claim was consolidated with the compensation claim for hearing because it seemed more expeditious to hold one hearing rather than two hearings, especially in view of the fact that there were common witnesses for the prosecution of both claims who would have been required to testify at both hearings. Nonetheless, it is clear that a claim under Section 49 is a separate and distinct claim from one for compensation. It usually involves different facts than those relevant to a disability claim.

The ALJ estimated that counsel had devoted 40 percent of his time to the Section 49 claim, and thus awarded fees for only 60 percent of the hours worked.

Appendix A

The Benefits Review Board reversed the ALJ's denial of fees for prosecution of the unsuccessful claim. Correctly noting that "[i]t is improper to limit the fee only to work performed on *issues* on which claimant prevails (emphasis added)," the Board went on to extend that principle from issues to claims, stating simply:

> The Board has allowed an attorney's fee for work performed on an unsuccessful discrimination claim where claimant has prevailed in obtaining disability compensation. *Nooner v. National Steel & Shipbuilding Co.*, 19 BRBS 43 (1986); *Battle v. A.J. Ellis Construction Co.*, 16 BRBS 329 (1984). Therefore, the fact that claimant did not prevail on the Section 49 claim in the instant case does not preclude a fee for work on that issue.

For an explication of the Board's reasoning, it is necessary to turn to the *Battle* case cited by the Board. There, the ALJ had awarded full fees for both the disability and the unsuccessful retaliation claims. The Board affirmed the award of fees. The Board made analogy to cases in which claimants had prevailed only on some *issues*, reasoning that "[i]n most cases, the issues are too inter-related to permit allocation of the fee between successful and unsuccessful issues. Therefore, in this case the fact that claimant did not prevail on Section 49 does not *preclude* a fee for work on that issue." 16 BRBS at 331 (emphasis supplied) (footnote omitted). The employer in *Battle* argued that its case was distinguishable, because the Section 49 claim required a separate hearing and constituted "a separate claim rather than a related issue." *Id.* at 332. The Board rejected this argument:

> Although a separate hearing was held, the Section 49 issue was decided in the same decision and order

> as the disability issue and arose because of evidence presented at the first hearing. Accordingly, we hold that work on it was related and compensable.

Id.

In *Nooner,* the Board merely cited *Battle* as authority for once again affirming an ALJ's award of fees on an unsuccessful yet related Section 49 claim. The only other case to come to our attention is that now before us, where, for the first time, the Board has *reversed* an ALJ, and awarded fees despite a finding that the claims were not interrelated. The Board's standard in *Battle* seems, then, to have been transformed *sub silentio* from a rule that an ALJ should not be *precluded* from granting fees on an unsuccessful claim where that claim is intertwined with the successful claim, to a rule that the ALJ is *constrained* to award such a fee on the *presumption* that the claims are sufficiently related.

Apparently we are the first appellate court to reach this precise issue. Therefore, we are working on a blank slate. The applicable attorney's fee statute is not very helpful. It reads in pertinent part: "[If] the person seeking benefits shall . . . have utilized the services of an attorney at law in the successful prosecution of his claim [for compensation], there shall be awarded, in addition to the award of compensation, . . . a reasonable attorney's fee against the employer . . . ." 33 U.S.C. § 928(a). The House Report accompanying the Act elucidated a bit more: "Attorneys fees may only be awarded against an employer where the claimant succeeds, and the fees awarded are to be based on the amount by which the compensation payable is increased as a result of the litigation." H.R. 1441, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S. Code Cong. & Admin. News 4698, 4706.

Appendix A

In the instant case, and those like it, the claimant "succeeds" on the disability claim and fails to "succeed" on the Section 49 claim. The claimant, in other words, achieves partial compensation, and partial success.

We see no reason why attorney's fees under this statute should be treated any differently than under statutes authorizing fees to a "prevailing party." Those statutes are governed by the general rules announced in *Hensley v. Eckerhart,* 461 U.S. 424 (1983). *See id.* at 433 n.7 (*Hensley* standards generally applicable in all cases where Congress has authorized fees to "prevailing party"). We reproduce the reasoning of the Supreme Court in some detail, as guidance for decisions in this area:

> In some cases a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories. In such a suit, even where the claims are brought against the same defendants[,] . . . counsel's work on one claim will be unrelated to his work on another claim. Accordingly, work on an unsuccessful claim cannot be deemed to have been "expended in pursuit of the ultimate result achieved." The congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim.
>
> It may well be that cases involving such unrelated claims are unlikely to arise with great frequency . . . In [some] cases the plaintiff's claims for relief will involve a common core of facts or

> will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court (or ALJ) should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.
>
> Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.

Id. at 434-35 (citations and footnotes omitted). The fee should not be derived through any mechanical formula. *Id.* at 438. It is an equitable judgment entrusted to the discretion of the factfinder, to be made on the basis of all the circumstances of the litigation. *Id.* at 437.

Where it would be an "exercise in futility" to separate out the legal services rendered for each claim, *see Garrity v. Sununu*,

752 F.2d 727, 735 (1st Cir. 1984), the fee should simply be determined as a function of degree of success.

We reject any hard and fast rule with respect to jointly filed claims of disability and retaliatory disharge under the Longshore and Harbor Workers' Compensation Act. The Board was mistaken to assume that there is a presumption of interrelatedness sufficient to award fees on both claims. There may be times when the claims are "virtually indistinct." *See Conservation Law Foundation of New England, Inc. v. Secretary of the Interior,* 790 F.2d 965, 970 (1st Cir. 1986). Much of the litigation may involve a "common core of facts," such that counsel's work time cannot be said to be severable in any meaningful sense. But just as likely, the claims may be readily severable. Unlike a civil rights action based on two different legal theories but one common set of facts, *see, e.g., Garrity, supra,* claims for disability and retaliatory discharge will often involve very disparate legal theories *and* factual situations. The disability claim will frequently be centered on medical testimony and evidence, while the Section 49 claim often will concern actions occurring after the injury at the place of employment. The witnesses, evidence, and legal preparation may be wholly distinct. Although some of the preparation may be material to both claims (e.g., discussions with the plaintiff, preparations for the plaintiff's testimony), much of it will be readily demarcated between claims.

Where, as here, the claims are adjudicated in a single, joint hearing, counsel's fees for the hearing itself might be awarded without regard to the differential success of the claims. But preparatory work might be more easily separable much of the time, particularly where, as here, the claims were filed separately

and could have been separated for hearing.[2] If such differentiation can be determined, partial success should mean partial fees.

These determinations are best left to the trial judge, in this case the ALJ. The Supreme Court emphasized that, because of the equitable nature of this determination, the factfinder's discretion should be broad. *Hensley,* 461 U.S. at 437. "This is appropriate in view of the [factfinder's] superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Id. See also Garrity,* 752 F.2d at 735.

In the instant case, the ALJ noted that the two claims were consolidated for hearing in the interests of expedition because there were "common witnesses for the prosecution of both claims," principally, we suspect, the claimant himself. The ALJ then spoke in general terms: "[I]t is clear that *a* claim under Section 49 is a separate and distinct claim from one for compensation." (Emphasis added.) Nonetheless it is apparent that the ALJ did consider the particular claims in this case, and found them separate and distinct. The record manifests the separateness of the events and evidence at issue in the two claims. The critical events relating to the Section 49 claim occurred between December 13, 1981 and February 12, 1982, and had little or nothing to do with the focus of the disability claim, *i.e.,* the nature and extent of claimant's injuries.

The ALJ methodically scrutinized — and reduced — total hours expended, noting that the issues were not complicated and

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2. We do not mean to suggest that separate or coordinated hearings are dispositive one way or the other — they might merely be material in determining whether counsel's time can be differentiated amongst various claims.

counsel was experienced. He then considered counsel's estimate that the Section 49 claim accounted for 25 percent of counsel's time, but concluded from his "review of the entire record" that at least 40 percent of the time was spent on the Section 49 claim. He was also able to identify and deduct the particular costs attributable to transcripts of testimony relating to the retaliation claim.

The ALJ honored Congress' intention that fees should be awarded "based on the amount by which the compensation payable is increased as a result of litigation." The Section 49 claim did not increase respondent's compensation at all. The determination of the ALJ must be accorded a broad degree of deference. "The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole." 33 U.S.C. § 921(b)(3). The Board "may not engage in de novo review and substitute its findings for the ALJ's." *Prolerized New England Co. v. Benefits Review Board,* 637 F.2d 30, 35 (1st Cir. 1980).

Enforcement denied. Remanded for further proceedings consistent with this opinion. Each party to bear its own costs.

APPENDIX B — DECISION AND ORDER OF THE BENEFITS REVIEW BOARD DATED SEPTEMBER 17, 1987

U.S. Department of Labor
Benefits Review Board
1111 20th St., N.W.
Washington, D.C. 20036

(NOT PUBLISHED)
(FILED AS PART OF THE RECORD)

BRB No. 84-637

Date: September 17, 1987
s/ Linda M. Mukins
Clerk of the Board
Benefit Review Board

PETER E. HORRIGAN

Claimant-Petitioner

v.

GENERAL DYNAMICS CORPORATION

Self-Insured
Employer-Respondent

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits, Decision on Motion for Reconsideration, and Supplemental Decision and Order Granting Attorney Fee of Chester Shatz, Administrative Law Judge, United States Department of Labor

Appendix B

William T. Salisbury, Quincy, Massachusetts, for the claimant.

Stephen E. Laskin (Murphy & Beane) and William B. Koffel (Foley, Hoag & Eliot), Boston, Massachusetts, for the self-insured employer.

Before: SMITH and DOLDER. Administrative Appeals Judges, and MURRAY, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits, the Decision on Motion for Reconsideration, and the Supplemental Decision and Order Granting Attorney Fee of Administrative Law Judge Chester Shatz issued pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the Act).

Claimant, a crane operator for employer, injured his left knee and ankle on October 16, 1980 when he tripped over scrap iron in the shipyard. Employer voluntarily paid temporary total disability compensation from October 17, 1980 through December 13, 1981, at which time claimant's physician Dr. DiCecca, released claimant to return to work with no restrictions. Claimant, however, began work as a rigger for a different shipyard on December 14, 1981 without employer's knowledge or permission. After experiencing difficulty working as a rigger, claimant returned to

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* Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C.A. § 921(b)(5) (West 1986).

work for employer on January 11, 1982 as a crane operator, passed the mandatory physical examination, and was assigned to full duties, but he did not answer a question on a medical history supplement asking whether he had performed any work after he stopped working for employer. When employer discovered claimant's employment with the other shipyard, claimant was discharged. Claimant filed a claim for compensation for temporary total disability from February 13, 1982 to October 3, 1982 and from October 22, 1982 and continuing, as well as a claim pursuant to Section 49 of the Act. 33 U.S.C. § 948a.

The administrative law judge denied claimant's Section 49 claim, finding that employer did not discriminate against claimant. The administrative law judge found that the record established employer discharged claimant for violating company rules and for falsifying his reason for absence from work between December 14, 1981 and January 11, 1982. The administrative law judge also found that although claimant could not return to his usual longshore work as a rigger or crane operator, employer established the existence of suitable alternate employment opportunities as a telephone order clerk, a parking lot attendant and a self-service gas station cashier. Thus, the administrative law judge awarded permanent partial disability benefits under the schedule for a 35 percent impairment of the left leg. In awarding attorney's fees, the administrative law judge found claimant's counsel reasonably spent 94.25 hours on the case but reduced that figure by 40 percent because he found counsel was not entitled to fees for services and expenses related to the unsuccessful Section 49 claim. The administrative law judge denied claimant's motion for reconsideration.

Claimant appeals, arguing that the jobs identified by employer's rehabilitation counselor do not consti·te suitable

alternative employment. Claimant also argues that the administrative law judge erred in denying an attorney's fee for services performed on the unsuccessful Section 49 claim.

The Board's scope of review is governed by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are in accordance with law, they are binding upon this Board and may not be disturbed. 33 U.S.C. § 921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 350 U.S. 359 (1965).

We affirm the administrative law judge's finding that employer established the existence of suitable alternate employment. Claimant fails to specifically challenge the administrative law judge's finding that claimant is able to perform the sedentary job of telephone order clerk, which was posted at the Massachusetts Division of Employment Security on August 23, 1983. Moreover, we hold that the administrative law judge's finding that the telephone order clerk job constitutes suitable alternative employment available in the Boston area is supported by substantial evidence. *See New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 10 BRBS 505 (1st Cir. 1979); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74 (CRT) (4th Cir. 1984).

We cannot, however, affirm the attorney's fee award. An attorney's fee award will not be disturbed unless it is shown by the opposing party to be arbitrary, an abuse of discretion, or contrary to law. *Offshore Food Service, Inc. v. Murillo*, 1 BRBS 9 (1974), *aff'd sub nom. Offshore Foods Service, Inc. v. Benefits Review Board*, 524 F.2d 967, 3 BRBS 139 (5th Cir. 1975). It is improper to limit the fee only to work performed on issues on

which claimant prevails. *Hilyer v. Morrison-Knudsen Construction Co.*, 12 BRBS 87 (1980), *aff'd in pertinent part*, 670 F.2d 208, 14 BRBS 671 (D.C. Cir. 1981), *rev'd on other grounds, Morrison-Knudsen Construction Co. v. Director, OWCP*, 461 U.S. 624 (1983); *Cherry v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 857 (1978). The Board has allowed an attorney's fee for work performed on an unsuccessful discrimination claim where claimant has prevailed in obtaining disability compensation. *Nooner v. National Steel & Shipbuilding Co.*, 19 BRBS 43 (1986); *Battle v. A.J. Ellis Construction Co.*, 16 BRBS 329 (1984). Therefore, the fact that claimant did not prevail on the Section 49 claim in the instant case does not preclude a fee for work on that issue. The administrative law judge found that 94.25 hours were reasonably necessary for the prosecution of both claims and neither party contests this finding. We therefore modify the attorney's fee to award fees for 94.25 hours of work at $125 per hour and costs of $2,110.15.

Accordingly, the administrative law judge's Decision and Order and Decision on Motion for Reconsideration are affirmed. The Supplemental Decision and Order Granting Attorney Fee is modified consistent with this opinion.

SO ORDERED.

s/ Roy P. Smith
ROY P. SMITH
Administrative Appeals Judge

s/ Nancy S. Dolder
NANCY S. DOLDER
Administrative Appeals Judge

Appendix B

s/ Freeman C. Murray
FREEMAN C. MURRAY
Administrative Law Judge

Dated this 17th
day of September 1987

APPENDIX C — DECISION AND ORDER AWARDING BENEFITS OF THE ADMINISTRATIVE LAW JUDGE DATED DECEMBER 19, 1983

U. S. Department of Labor
Office of Administrative Law Judges
John W. McCormack Post Office
and Courthouse
Room 409
Boston, Massachusetts 02109

Case No. 83-LHC-3421

OWCP No. 1-52146

In the Matter of:

Peter Horrigan,

Claimant

v.

General Dynamics Corporation,

Employer/Self-Insurer.

Appearances:

William Salisbury, Esq.
85 Clay Street
Quincy, MA 02169
For the Claimant

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Donald E. Wallace, Esq.
Law Office of Murphy & Beane
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For Employer/Self-Insurer
(on disability claim)

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For Employer
(on the Section 49 claim)

Before: CHESTER SHATZ
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

Preliminary Statement of Fact

This proceeding involves a claim arising under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, hereinafter referred to as the "Act". This matter has been the subject of a hearing before me, and the parties have been afforded a full opportunity to present facts and argument in support of their positions. The following references will be used herein: TR for transcript, CX for Claimant's exhibit and GDX for Employer's exhibit.

The parties were given the opportunity to take post-hearing depositions and to file briefs. Transcripts of all depositions and written statements of one witness in lieu of deposition have been

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received and admitted into evidence as the following exhibits:

GDX's — 30 and 31 — 2 statements of Robert E. Derecktor dated August 30, 1983.

GDX 32 — Deposition cf Alan L. Ey

GDX 33 — Deposition of Dr. Peter Ferrino

GDX 34 — Deposition of Dr. Carl Sterpi

GDX 35 — Deposition of Dr. Joseph Bogni

GDX 36 — Deposition of Dr. Edwin T. Wyman

Briefs have been received from all counsel, and the record was closed on November 25, 1983.

This case involves 2 separate claims. One claim is for disability benefits wherein Claimant is seeking compensation for temporary total disability from February 13, 1982 to October 3, 1982 and from October 22, 1982 through the present and continuing. The other claim arises under Section 49 of the Act since Claimant alleges that his employment was terminated by Employer because of his filing for compensation benefits. Employer argues first that Claimant is not disabled, but if so, it is not the responsible employer. Employer contends further that, in any event, Claimant is, at most, permanently and partially disabled and only entitled to a scheduled award pursuant to Section 8(c) of the Act. Finally, with respect to the disability claim, Employer states that if Claimant is found permanently disabled, it is entitled to relief under Section 8(f) of the Act. With regard to the Section 49 claim, Employer defends on the grounds that Claimant was not fired

from his job because of his filing a compensation claim. Thus, the issues in this case are: (a) the extent of Claimant's disability, (b) whether General Dynamics is the responsible employer, (c) whether Section 8(f) relief should be granted, and (d) whether Claimant was wrongfully discharged from employment because of the filing of a claim for compensation. For reasons below, I find that Claimant is entitled to a scheduled award under Section 8(c) of the Act, and that the Section 49 claim is without merit.

The parties stipulated, and I so find from my evaluation of the record, the following facts:

1. The Act applies.

2. An employer-employee relationship existed through at least sometime in February, 1982.

3. Timely notice of claim was given and the claim was timely controverted.

4. The incident giving rise to the claim for compensation occurred on October 16, 1980.

5. Compensation was voluntarily paid by Employer for the period from October 17, 1980 through December 13, 1981 or a total of 60 and 3/7 weeks, and that the total compensation paid was $17,010.04.

6. Informal conference before the Deputy Commissioner was held on March 14, 1980, and that, with respect to the Section 49 claim, the Deputy Commissioner denied same by a memorandum decision dated March 28, 1983.

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Findings of Fact

1. Claimant was born February 21, 1948, has the equivalency of a high school diploma, and except for about one year when he was in the service worked for Employer from about September, 1966 to February 12, 1982 when Employer terminated his employment for cause. Claimant started as a third class rigger and worked his way up to becoming one of the top crane operators in Employer's Quincy, Massachusetts shipyard. In fact, by 1976 he had become expert at operating every type of crane in the yard.

2. During the course of his employment Claimant suffered approximately 9 work-related incidents of trauma to his left knee and ankle as a result of impacts and falls, all of which were reported to, and treated at, Employer's medical facility in the shipyard. One of the more significant incidents occurred during March, 1979 when Claimant fell approximately 12 feet while climbing a ladder and suffered rather severe injuries to his left knee and left ankle. Those injuries required Claimant to miss 2 weeks of work for which he was paid compensation under the Act.

3. The incident giving rise to the disability claim involved in this appeal occurred on October 16, 1980 when Claimant tripped over some scrap iron in the yard and seriously re-injured his left knee and left ankle. Those injuries required extensive treatment by Dr. Charles A. DiCecca, a Board-certified orthopedic surgeon. Dr. DiCecca performed a surgical reconstruction of the left ankle during November 19, 1980. Thereafter the surgical wound became seriously infected and Claimant had to be rehospitalized for approximately 3 weeks to receive intravenous antibiotic treatment. Although the ankle condition stablized somewhat, Claimant's knee continued to bother him, and he experienced pain and swelling of the knee joint. Dr. DiCecca performed an arthroscopy of the

left knee on June 18, 1981 which indicated a probable internal derangement of the lateral compartment. As a result, Claimant was hospitalized in September, 1981 and underwent arthrotomy and excision of a torn lateral meniscus. He was discharged from the hospital on October 3, 1981, and after a period of convalescence he felt that he was ready to return to work in December 1981.

4. Because of his desire to return to work, Claimant asked Dr. DiCecca to give him a written medical statement indicating that he now was fit for employment, and thus on December 10, 1981 Dr. DiCecca placed a note in his records that Claimant was "comfortable enough to return to work" and would return to work on December 14, 1981. GDX 17. Dr. DiCecca forwarded a copy of this office note to Employer's compensation agents, and as a result, Claimant's compensation benefits were ceased as of December 13, 1981. Dr. DiCecca, assuming that Claimant intended to return to his job at General Dynamics, gave Claimant a medical certificate, dated "December 10, 1981" which indicated that Claimant could return to work on December 14, 1981 (GDX 13), and no work limitations or restrictions were indicated on that certificate. Despite the fact that Employer never threatened Claimant's discharge when he experienced his prior injuries, Claimant did not intend to return to work for Employer on December 14, 1981. Moreover, he never informed Dr. DiCecca of this fact.

5. When Claimant requested a clearance for work from Dr. DiCecca, he actually had a job offer as a rigger from another shipyard owned by General Ship and Engine Works Inc., in East Boston, Massachusetts. His testimony reflects he wanted to try that job since it did not require any ladder climbing, and he therefore felt that the work would be less demanding on his left

knee and left ankle than the work of a crane operator. Without notifying Employer Claimant began work as a rigger for General Ship on December 14, 1981 but the residuals from his left knee and left ankle injuries interfered significantly with the performance of his rigging duties. Because he was experiencing pain and numbness in his left foot and swelling in his left knee, he knew he could not adequately perform rigging work at his new employer's shipyard. As a result, he voluntarily terminated that employment on Friday, January 8, 1982, after having only worked about three weeks. In this connection, a note on Claimant's employment record at General Ship reads as follows:

> Voluntary Quit, former injury of knee at General Dynamics forces him to resign here. He admits to me, we are not involved; will re-open case with General Dynamics (EX 1 to Hiland deposition).

5. On leaving his job at General Ship Claimant decided to report to work at General Dynamics as a crane operator on Monday, January 11, 1982. However, he thought that he would be unable to pass the required physical examination and would then be returned to compensation status. With that intent in mind and armed with the medical release for work from Dr. DiCecca dated "December 10, 1981" (GDX 13), he reported ready for work on Monday, January 11, 1982. Since he was returning after an injury, he was required to report first to Employer's medical facility for a clearance examination. When he did so, he was given a medical history supplement to fill out which contained a question asking for information concerning what work, if any, he performed after he previously stopped working for Employer (GDX 15); Claimant did not answer that question but instead left it blank. Notes from Dr. Bogni, the medical director at shipyard, reveal that Claimant stated he did not return to work

on December 14, 1981 because his knee was still bothering him (Dr. Bogni's deposition, pp. 13-15). Thus, it is clear from the record that Claimant did not disclose the truth about his work during December and early January at General Ship.

6. Dr. Bogni's notes concerning his examination of Claimant on January 11, 1982 show that range of motion of Claimant's left ankle "was slightly decreased but (that) he had good function." Concerning the left knee, Dr. Bogni noted some generalized swelling and that range of motion was slightly restricted and painful (Dr. Bogni's deposition, p. 13). Relying on his examination, his knowledge of a crane operator's duties and Dr. DiCecca's medical clearance for work, Dr. Bogni thought that Claimant could return to work, and to Claimant's surprise he cleared him for returning to work as a crane operator without restrictions.

7. When Claimant returned home after his first day of work on January 11, 1982, his mail included a letter from Employer dated January 8, 1982 stating that it had received notice that Dr. DiCecca had cleared him to return to work on December 14, 1981, and that in the event he did not report to work by January 14, 1982 he could be terminated. GDX 14. Claimant conceded in his testimony that he had returned to work at Employer's yard before receiving that letter, and thus I find that letter in no way contributed to Claimant's return to work. Furthermore, I conclude that the letter indicated that Employer was desirous of having Claimant return to work despite his past injuries.

8. After Claimant was cleared for work, he began operating the low cranes. However, he worked with difficulty and experienced significant pain as well as swelling of his left knee and some numbness in his left foot. Those conditions continued

through February 2, 1982 when he was suspended as an employee for reasons which are discussed below, and which were not related to his physical impairments or his ability to perform his job duties.

9. Sometime during late January, 1982 after Claimant had returned to work, Mr. Dale Raffeld, Employer's Manager of Labor Relations received information from one of Claimant's superiors that Claimant had been working elsewhere during part of the period of time he claimed that he was physically unable to work at General Dynamics. TR 218. Mr. Raffeld thereafter conducted an investigation, and on February 2, was informed by others that Claimant had been paid compensation through December 13, 1981, and that he thereafter worked for General Ship from December 16, 1981 through January 8, 1982. *See* GDX 16, 18 and TR 221-222. Upon learning those facts, Mr. Raffeld immediately directed Claimant's supervisor to notify Claimant that he was under investigation for violating company rules. TR 222.

10. The rules that Mr. Raffeld had in mind were included in a handbook which listed various grounds warranting dismissal from employment, including the following:

> Your job at the Quincy Shipbuilding Division should be considered your primary employment. Any other job is secondary.
>
> Any outside employment or business interest that adversely affects your work or your responsibilities or which presents a conflict of interest may result in disciplinary action, including dismissal.
>
> Excessive tardiness or absenteeism, absence without

reasonable cause or failure to immediately notify Quincy Shipbuilding Division of your absence. (Five Consecutive working days of unexcused or unreported absence is cause for dismissal).

Falsification of personnel, medical or other records, omission of pertinent data or giving false testimony. See GDX 20 pp. 15, 17 and 18.

11. On February 3, Mr. Raffeld met with Claimant and 2 union officials to discuss the matter, and at the conclusion of the meeting, Mr. Raffeld handed Claimant a report of "Unsatisfactory Conduct" commonly called a "chit" which, in effect, informed Claimant that he was being suspended pending further investigation because of apparent violation of rules and regulations including falsification of his reason for absence between December 14, 1981 (the date his doctor stated he could return to work) and January 11, 1982 (the date he returned to work at Employer's shipyard). *See* GDX 22. After his investigation was completed, Mr. Raffeld had a member of his staff write Claimant that he was discharged as an employee effective February 12, 1982. In the letter Claimant was informed that he was discharged because of "violation of company rules and regulations, falsification of your reasons for absence". *See* GDX 19. At the hearing, Mr. Raffeld indicated that violation of the rules set forth in Finding No. 10 above was the basis for discharging Claimant (TR 237-238), and he further indicated that he had discharged at least six other employees for similar violations. TR 238-239.

12. After Claimant was fired he continued to have trouble with his left knee, left ankle and left foot. However, by October 1982 he felt well enough to again attempt returning to work. On or about October 5, 1982 he started work as a rigger at a small

shipyard in Rhode Island owned by Robet E. Derecktor. However, his left knee ankle and foot continued to bother him with pain, numbness and swelling. He was unable to adequately perform the required duties of a rigger since he had extreme difficulty bending and climbing because of his impairments. His employment record at that shipyard indicates that he missed several days of work. Finally after only 3 weeks on the job, his employer terminated his employment on October 31, 1982 because he felt Claimant "had trouble climbing and bending", and that his "versatility was not sufficient" for the rigging work at the yard. *See* GDX 30 and 31. I thus conclude that Claimant's effort to return to work was unsuccessful because of his pre-existing impairments.

13. Claimant has not worked since the above referenced unsuccessful work attempt, and it is his contention that he has remained temporarily totally disabled. However, his treating physician indicated at the hearing that Claimant retains the residual functional capacity to perform at least sedentary work (TR 159, 206-207), and I so find. Vocational evidence in the record indicates that Claimant has the ability to perform such sedentary jobs of order-clerk, parking lot attendant, and self-service gas station cashier, and that such jobs are available in the Boston area (*See* deposition of Alan Ey). I thus conclude that Employer has demonstrated suitable, alternative employment, and that Claimant is not totally disabled and has not been since at least December 14, 1981 when he was released for work.

14. Despite the above finding, I am of the view that Claimant is unable to perform his past shipyard work as a rigger or crane operator because of the lifting, bending and climbing involved. This conclusion is based on the fact that Claimant has some permanent loss of function of his left lower extremity. I also find

that as of December 14, 1981 when claimant attempted rigging work at General Ship he was permanently and partially disabled because of a permanent and partial loss of function of his left lower extremity.

15. Dr. Wyman, a Board-certified orthopedist, who examined Claimant on behalf of Employer stated his opinion that in May, 1983 Claimant had a permanent loss of function of the left lower extremity amounting to a 25% loss (15% for the left ankle injury and 10% for the knee impairment). *See* Wyman deposition, p. 17 and GDX 9. Claimant's treating physician on the other hand stated on June 22, 1982 that Claimant suffered a permanent loss of function of the left lower extremity amounting to a 45% loss. CX 6. At the hearing Dr. DiCecca opined that Claimant's condition had deteriorated since June, 1982 and would continue to do so. However, I note that those opinions by both Dr. Wyman and Dr. DiCecca, while made in good faith, are purely subjective in nature. Moreover, I recognize the fact that it is difficult to quantify with exactness the precise degree of loss of function when such loss of function is less than total. Taking into account all of the medical reports of record and Claimant's appearance at the hearing (he sat throughout the 2-1/2 days of hearing without difficulty and appeared to walk without distress), I conclude that the degree of Claimant's loss of function of his left lower extremity falls somewhere between Dr. Wyman's assessment of 25% and Dr. DiCecca's assessment of 45%. Realizing the uncertainty associated with attempting to quantify a loss of function on a percentage basis, and aware of the fact that both Dr. Wyman and Dr. DiCecca are extremely well-qualified orthopedists, I conclude that striking a balance between their two separate percentage assessments would be a fair way of determining Claimant's loss of function. In doing so, I find that as of December 14, 1981 when Claimant returned to work he had a permanent

and partial loss of function of his left lower extremity amounting to 35% which has continued through the present. I make this finding cognizant of Claimant's testimony concerning his subjective complaints of pain. However, I do not give much credence to Claimant's testimony since his overall testimony was vague, inconsistent and evasive in many respects.

16. From the evidence of record I note that Claimant's average weekly wage for the 12 month period preceding his injury in October, 1980 was $422.24 (GDX 6), and that his compensation rate based on two-thirds of that average weekly wage should be $281.49 (that amount was the weekly compensation rate previously paid Claimant between October 16, 1980 and December 13, 1981).

Additional Findings of Fact,
Discussion and Conclusion of Law

Employer's first argument that Claimant was no longer disabled on December 14, 1981 when he was released for work is without merit since subsequent events clearly indicate that he could not adequately perform his past shipyard work because of his impairments. In this regard, during his short work periods at General Ship, General Dynamics and later at the Derecktor shipyard, Claimant was experiencing pain, numbness and swelling of his left knee. Thus, the residuals from his earlier injuries left him with some permanent disability as of December 14, 1981. Further, with regard to Employer's contention that it should not be considered the responsible employer because Claimant worked for 2 other employers after December 13, 1981, I find that argument to be without merit. I note first that Claimant worked for only very short periods of time for those 2 other employers, and that he was physically unable to adequately perform the work assigned to him because of his impairments that resulted from

his injuries at Employer's shipyard. Moreover, there is no credible evidence of record indicating that Claimant suffered any injuries or aggravation of his prior injuries during the few weeks he worked for those 2 employers. I therefore find that General Dynamics is the responsible employer for payment of compensation for disability, and that such disability resulted solely from traumatic injuries arising out of and in the course of Claimant's work at Employer's shipyard.

Concerning the extent of Claimant's disability, I find that Claimant had reached maximum medical improvement before he started working again on December 14, 1981, and that he was at that time permanently and partially disabled because of a 35% loss of function of his left lower extremity (*See* Finding Nos. 13 and 14 above). Pursuant to the holding in *Potomac Electric Power Co. v. Director, OWCP, U.S. Department of Labor, et al,* 449 U.S. 268 (1980), Claimant is only entitled to a scheduled award under Section 8(c)(2). Since that section provides that compensation will be paid for 288 weeks for total loss of function of a lower extremity, Claimant is entitled to be paid compensation for 100.8 weeks (35% of 288 weeks) at the rate of $281.49 per week (i.e. two-thirds of his average weekly wage of $422.24). Because Claimant is to be paid compensation for only 100.8 weeks, Section 8(f) of the Act does not apply. For purposes of computing interest on past due benefits, onset of Claimant's 35% loss of function of his left lower extremity is hereby established as December 14, 1981.

Turning now to the Section 49 claim, I note that Claimant contends that he was discharged from employment because Employer desired to avoid payment of compensation. Of course, if he is correct, he would be entitled to Section 49 relief since that section provides in part as follows:

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> It shall be unlawful for any employer or his authorized agent to discharge or in any other manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim compensation from such employer . . .

In cases arising under Section 49, the burden of proving a discriminating act is on the Claimant. However, because of the humanitarian and beneficient purposes of the Act and the rule that doubtful questions of fact must be resolved in favor of the Claimant, the burden of proof required is something less than the preponderance-of-the-evidence standard. *Gondolfi v. Mid-Gulf Stevedores, Inc.*, 11 BRBS 295 (1980); *Martin v. General Dynamics Corp.*, 9 BRBS 836 (1978). However, it is also settled that an employer is free to discharge an employee for any reason as long as it does not fire him for filing a compensation claim (See *Gondolfi, supra*).

From the record I find that Claimant has not sustained his required light burden of proof. The record indicates that Claimant was working at Employer's shipyard when he was fired, and that he was no longer on compensation at that time. Moreover, there is no evidence indicating that Employer was concerned about the possibility of Claimant's filing a new claim after he returned to work in January, 1982. Rather, the record is clear that Employer wanted Claimant to return to work and requested that he do so as soon as it found out that he had been released for work by his treating physician. The record indicates to me that Employer had justifiable grounds for terminating Claimant's employment on February 12, 1982 since it is clear that Claimant's conduct after being released for work by his doctor in December 1981 was far from exemplary, and in any event violated Employer's

rules. In this regard and as found above, Claimant did not report to work for Employer when released for work by his doctor even though he was required to do so under Employer's rules. Instead he started working at another shipyard and did not disclose this fact to Employer until 3 weeks after he returned to work for Employer, and only as a result of being questioned by Employer's compensation agents. In fact, Claimant attempted to hide the fact that he had worked elsewhere after December 13, 1981 when he reported to work for Employer on January 11, 1982. Thus Employer's claim that Claimant was discharged for violating company rules and for falsifying his reason for absence from work during the period between December 14, 1981 and January 11, 1982 is clearly supported by the record before me. Moreover, it is equally clear that Employer did not discriminate against Claimant since testimony reveals that other employees had been discharged for the same reasons. I therefore can only conclude from the evidence that Employer's motive in terminating Claimant's employment effective February 12, 1982, was based solely on Claimant's conduct and failure to adhere to Employer's rules, and was not based on any filing, or threat of filing, a compensation claim. I therefore find that Claimant's discharge was not unlawful under the Act, and that the Section 49 claim lacks merit and must be denied.

Attorney Fees

Claimant's counsel has submitted an application for a legal fee and expenses in the total amount of $17,891.40. Employer has filed objections to many of the items included in the fee application, and I note these objections are only general in nature and without supporting reasons. Therefore the objections as submitted are not too helpful in any evaluation concerning the reasonableness of the legal fee and expenses requested. Since the

total amount of the fee and expenses requested is substantial, I am of the view that more information is needed from Claimant's counsel before I can make a fair and impartial evaluation. I also am of the view that Employer should be given an opportunity to submit additional material by way of a supplement to its previously filed objections. Such supplement should indicate the reasons for its objection to each item listed and also should indicate Employer's assessment of the amount of hours that should reasonably have been expended for each item objected to. Moreover inasmuch as the Section 49 claim has been denied, the parties should submit written arguments concerning whether or not the fee requested by counsel is affected by my denial of the Section 49 claim.

In view of the above, Claimant's counsel should submit a supplement to the fee application within 30 days indicating whether the listed time for each item is based on estimates or actual time records. If based on actual time records, copies should be attached to the Supplement. Claimant's counsel also should submit the amount of time spent on the Section 49 claim (either in hours or as a percentage of the total time spent). Claimant's counsel may also submit within the same 30 days written arguments in support of the position that the denial of the Section 49 claim has no effect on the legal fee and expenses requested. After receipt of copies of the supplemental information and arguments, Employer's counsels will have 30 days in which to file their supplemental material indicated above, including written arguments opposing payment of that part of the requested legal fee and expenses related to handling the Section 49 claim.

ORDER

Based upon the foregoing findings of fact, conclusions of

law and upon the entire record, I make the following compensation order. The specific dollar computation of the compensation award shall be subject to verification and calculation by the Deputy Commissioner.

It is therefore ORDERED that:

1. Employer shall pay to Claimant at the statutory rate compensation for permanent partial disability commencing December 14, 1981 pursuant to Section 8(c)(2) for a 35% loss of function of the left lower extremity, based on an average weekly wage of $422.24.

2. Employer shall pay directly to William T. Salisbury, Esq., counsel for the Claimant, a reasonable fee for legal services rendered plus any necessary legal expenses incurred, which amounts will be determined after the submission and approval of an appropriate application for same.

3. Employer shall pay interest at the rate of 6% per annum for each installment of compensation due from the date due to the date paid.

4. Employer shall bear continued responsibility for providing past and future medical services and supplies involving the work-related injuries to Claimant's left lower extremity.

5. The Section 49 claim is hereby denied.

s/ Chester Shatz
CHESTER SHATZ
Administrative Law Judge

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Dated: December 19, 1983

Boston, Massachusetts

CS:rlb

APPENDIX D — SUPPLEMENTAL DECISION AND ORDER GRANTING ATTORNEY FEE OF THE ADMINISTRATIVE LAW JUDGE DATED APRIL 2, 1984

U. S. Department of Labor
Office of Administrative Law Judges
John W. McCormack Post Office
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Room 409
Boston, Massachusetts 02109

Case No. 83-LHC-3421

OWCP No. 1-52146

In the Matter of:

Peter Horrigan,

Claimant

v.

General Dynamics Corporation,

Employer/Self-Insurer.

SUPPLEMENTAL DECISION AND ORDER GRANTING ATTORNEY FEE

In determining an appropriate attorney fee that should be paid counsel for Claimant, it is important to note the nature of the issues involved in the case and the results obtained. The case at the administrative law judge level involved two separate claims which were prepared together by counsel for hearing. One claim

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involved the narrow issue pertaining to the nature and extent of disability. In this regard, Claimant contended that he has been temporarily totally disabled from February 13, 1982 through the present and continuing except for a three week period in October, 1982 when he worked for an employer other than General Dynamics Corporation (hereafter the relevant period). The other claim arose under Section 49 of the Act wherein Claimant alleged that General Dynamics terminated his employment in 1982 because of his filing a claim for compensation. By my decision and order dated December 19, 1983, I found that Claimant had only been permanently and partially disabled during the relevant period and only entitled to a scheduled award under Section 8(c) of the Act for a 35% loss of function of his left lower extremity. Since Claimant's average weekly wage was $422.24, the total compensation due Claimant amounts to approximately $28,374 (35% times 288 weeks times 2/3's of $422.24). With regard to the Section 49 claim, I found it to be completely devoid of merit and it was accordingly denied.

Before the issuance of my decision, counsel for Claimant on November 8, 1983 submitted a fee application totalling $15,781.25 based on 126.25 hours of attorney time at an hourly rate of $125.00 an hour for services rendered in connection with the prosecution of both claims. In addition, counsel requested a total payment of $2,110.15 for expenses (which expenses he separately listed) incurred in connection with the prosecution of the claims. By letter dated November 18, 1983 Employer filed objections which were general in nature and without supporting reasons. Upon issuance of my decision, and in view of the fact that the Section 49 claim was denied, Counsel for Claimant was requested by me to submit a supplemental fee application indicating whether the listed time for each item of service in his fee application was based on estimates or actual time records,

and counsel was also directed to submit the amount of time expended on the Section 49 claim either in hours or as a precentage of the total time expended on both claims. The decision and order also gave the attorneys for Employer the opportunity to submit more detailed objections to the requested fee.

In response to my order counsel for Claimant has stated that his "fee petition for the most part was composed on the basis of estimated time," and counsel further stated that, with respect to the Section 49 claim, he could not realistically break down the time spent on that claim alone but instead estimated it to be 25% of the total time spent on both claims. He therefore deducted $3,945.31 (25% of his original requested fee amount) from $15,781.25, and he is now requesting a fee of $11,835.94. Counsel for Employer has responded with supplemental reasons for his objections to the fee requested. My review of his objections indicates that he is of the view that the total amount of time listed for both claims is excessive. In this regard, he questions approximately 50 hours of the total of 126.25 hours listed by counsel. Thus, under his view, only 76.25 hours should be allowed for the prosecution of both claims. In addition, he believes that the amount of time allocated to the Section 49 claim by Claimant (25% of the total) is much too low a figure. He does not seriously question the hourly rate of $125.00. and in fact states that Mr. Salisbury (Claimant's counsel) may well seek approval of an hourly rate of $125.00.

I have carefully reviewed the record in this case and the fee application together with Employer's objections, and for reasons below, I find the fee requested to be substantially excessive.

Since Claimant was unsuccessful in the prosecution of the Section 49 claim, I find that counsel is not entitled to be paid

any fee from the Employer for services and expenses incurred in connection with pursuing that claim. In this regard, it must be noted that the Section 49 claim was consolidated with the compensation claim for hearing because it seemed more expeditious to hold one hearing rather than two hearings, especially in view of the fact that there were common witnesses for the prosecution of both claims who would have been required to testify at both hearings. Nonetheless, it is clear that a claim under Section 49 is a separate and distinct claim from one for compensation. It usually involves different facts than those relevant to a disability claim. Moreover, the penalties and remedies for a violation of Section 49 are set forth exclusively in that section of the Act, and no separate provision is included for attorney's fees. Finally, note that counsel for Claimant does not seriously argue that he should be paid for services rendered in connection with that claim. Because counsel for Claimant has been unable to break out separately the time spent in pursuing the Section 49 claim but estimates it to be 25% of the total time expended on the two claims, I must first analyze the total hours expended on both claims as contained in counsel's fee petition to determine the reasonable amount of time that should have been spent on both claims. Then, in order to determine a reasonable fee for services rendered in connection with the disability claim, I must subtract from the total hours expended on both claims a reasonable percentage of hours for the time expended on the Section 49 claim.

I note first that Claimant's counsel has estimated that he spent a total of 126.25 hours in the prosecution of both claims. Since the issues in this case were not complicated and since counsel for Claimant is a very able and experienced compensation attorney, I am of the view that his estimate of the hours expended is somewhat excessive. In this regard, he lists a total of 16.25 hours spent in office consultations with the Claimant. I find that amount

of time to be unreasonable since the issues involved in the claims were not complex. I believe that no more than 8 hours of such office consultations should have been required. Hence, I disallow 8-1/4 hours set forth in the fee application for this effort.

I note next that counsel alleges a total of 5-1/4 hours spent on telephone calls with the office of Employer's counsel (Murphy & Beane), and that he has specified at least 15 minutes for each call. Counsel for Employer, on the other hand, states that almost all of these calls lasted no more than five minutes, and his assessment of the total time spent on these phone calls is approximately 1-3/4 hours. I find that assessment to be reasonable and I accept it. Therefore the amount of hours allowed for phone calls is 1-3/4 hours, and 3-1/2 hours are disallowed.

Counsel for Claimant also estimates in his fee application approximately 11 hours of time expanded in reviewing notices of depositions and routine correspondences and in preparing simple routine correspondence. I find his estimate to be too high, and allow only 5 hours for that work. Hence, 6 hours are disallowed.

Finally, I note that counsel estimates a total of 9-1/2 hours for review of the hearing transcript and various depositions plus a total of 30 hours for research and preparation of his brief, or a total of approximately 40 hours for review of the evidence and preparation of the written argument. I find those estimates to be unreasonably excessive since counsel participated in both the taking of the depositions and at the hearing. He showed an excellent knowledge of the facts and issues involved during his participation at the hearing. Thus, I am of the view that the estimate of 30 hours for preparing his brief is excessive, and a more reasonable amount of time for that effort should be 16 hours at least. I thus disallow 14 hours for brief preparation.

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In sum, the disallowance of hours, is as follows.

Office consultations with client	8.50 hours
Telephone call	3.50 hours
Review and preparation of correspondence	6.00 hours
Brief preparation	14.00 hours
Total	32 hours

Deducting the disallowed 32 hours from counsels' estimate of 126.25 hours, I arrive at a figure of 94.25 hours that were reasonably necessary for the prosecution of both claims. Of course, as stated above, part of that amount was expended on the Section 49 claim. Counsel estimates only 25% of his time was expended on that claim. I find that estimate to be low. In this regard, counsel himself concedes that the disability claim and Section 49 claim were "interwoven and closely associated". My review of the entire record indicates that at least 40% of counsel's time was expended on the Section 49 claim. Thus, I conclude that approximately 38 hours (40% of 94.25 hours) should be allocated solely to the Section 49 claim. I therefore find that counsel is to be paid for only 56.25 hours as the necessary and reasonable time required for prosecuting the compensation claim. I am of the view that his requested hourly rate of $125.00 is fair and reasonable for his services. Hence, counsel is entitled to a legal fee of $7,031.25 (56.25 hours x $125.00).

With regard to the expenses totalling $2,110.15, I note that the total sum of $1,268.48 for the purchase of the hearing transcripts is included in that figure. Since those transcripts included testimony relative to the Section 49 claim, I am disallowing 40% of those costs or $507.39. Although not too clear from the fee petition, all other costs apparently are not related

to the Section 49 claim and are therefore allowed. Thus, I find that the sum of $1,602.76 ($2,110.15 minus $507.39) represents the necessary expenses incurred in connection with prosecuting the compensation claim at the hearing level. Accordingly, Employer is ORDERED to pay to William T. Salisbury, Esq., the sum of $8,634.01 ($7,031.25 plus $1,602.76) as a reasonable attorney fee for services rendered to Claimant and for the necessary expenses incurred in prosecuting the compensation claim.

s/ Chester Shatz
CHESTER SHATZ
Administrative Law Judge

Dated: April 2, 1984

Boston, Massachusetts

CS:rlb

FILED
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CLERK

No. 88-451

In the Supreme Court of the United States

OCTOBER TERM, 1988

PETER E. HORRIGAN,
PETITIONER,

v.

GENERAL DYNAMICS CORPORATION,
RESPONDENT.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether an Administrative Law Judge, in a case arising under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§901 *et seq.* (the "Act"), is compelled by 33 U.S.C. §928(a) to award attorney's fees and expenses to a claimant's attorney for the unsuccessful prosecution of a discriminatory discharge claim filed under Section 49 of the Act (33 U.S.C. §948a) where a claimant has achieved partial success in a separate claim for disability benefits under the Act?

II

RULE 28.1 LISTING

Respondent General Dynamics Corporation's corporate affiliations, including all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates is as follows:

Etudes Techniques et Constructions Aerospatiales, Societe Anonyme (ETCA)
General Dynamics (C.I.) Limited
Mansour-General Dynamics Ltd.
Tusas Aerospace Industries, Inc.
Ankara Hilton
Mansour-General Dynamics GD (C.I.)
Perdata Corporation

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PETER E. HORRIGAN,
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v.

GENERAL DYNAMICS CORPORATION,
RESPONDENT.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The respondent General Dynamics Corporation respectfully requests that this Court deny the petition for writ of certiorari to the United States Court of Appeals for the First Circuit. The decision of the Court of Appeals is reported at 848 F.2d 321 (1988).

Statement of the Case

Peter Horrigan ("Petitioner"), who was formerly employed as a crane operator at respondent General Dynamics Corporation's Quincy Shipbuilding Division ("General Dynamics"), filed two separate and distinct claims under the Longshore and Harbor Workers' Compensation Act (33 U.S.C. §§901 *et seq.*) (the "Act") in 1983. One claim sought disability benefits due to injuries to his knee and ankle. The other claim alleged discriminatory discharge in violation of Section 49 of the Act (33 U.S.C. §948a). (Petition, Appendix C, p. 20a)

As a matter of convenience, the Administrative Law Judge ("ALJ") of the U.S. Department of Labor consolidated the two claims for hearing. In December, 1983, after a full hearing on the merits of both claims, the ALJ awarded Petitioner some, but not all, of the disability benefits he had sought under the Act. The ALJ denied the Section 49 claim, finding that the Petitioner "was discharged for violating company rules and for falsifying his reason for absence from work during the period between December 14, 1981 and January 11, 1982." (Petition, Appendix C, p. 33a) Petitioner subsequently appealed the ALJ's ruling on his claim for disability benefits to the Benefits Review Board ("Board") of the U.S. Department of Labor. Petitioner did not appeal the ALJ's denial of his Section 49 claim.

Petitioner's counsel submitted to the ALJ an application for attorney's fees and expenses for his work on both the disability claim and the Section 49 claim. Prior to ruling on this application, the ALJ requested that Petitioner's counsel submit supplemental information about his fee application and invited the parties to file "written arguments concerning whether or not the fee requested by [Petitioner's] counsel is affected by my denial of the Section 49 claim." (Petition, Appendix C, p. 34a)

Thereafter the ALJ issued a "Supplemental Decision and Order Granting Attorney Fee" in which he disallowed attorney's fees ($4,000) for counsel's excessive estimates of the hours he worked, awarded attorney's fees ($7,031.25) and expenses ($1,602.76) to Petitioner's counsel for the partial success in the prosecution of the claim for disability benefits, and denied attorney's fees ($4,750.00) and expenses ($507.39) for work associated with the unsuccessful prosecution of the Section 49 claim, finding that it was "a separate and distinct claim from the one for compensation" and was "completely devoid of merit." (Petition, Appendix D, p. 40a and p. 38a)

Petitioner's counsel petitioned the Board for review of the denial of attorney's fees and expenses for his work on the unsuccessful Section 49 claim. The Board modified the ALJ's

order to award Petitioner attorney's fees for his counsel's work on the unsuccessful Section 49 claim, effectively ruling that the ALJ did not have discretion to deny attorney's fees under the circumstances of this case. (Petition, Appendix B, p. 16a)

General Dynamics petitioned the Court of Appeals to review the Board's modification of the ALJ's order with respect to attorney's fees. The First Circuit denied enforcement of the Board's decision and remanded the case with instructions to accept the findings of the ALJ. 848 F.2d at 323.

Reasons Why the Petition Should Be Denied

I. There Is No Conflict Among the Circuits on the Question Presented.

The First Circuit's decision is not in conflict with the decision of any other federal court of appeals on the same matter. As Petitioner concedes, the First Circuit is the first appellate court to reach the question presented. Petitioner's argument that the petition should be granted due to "the lack of case law at the appellate level" (Petition, p. 5) ignores the rationale underlying Supreme Court Rule 17.1(a), which invokes this Court's supervisory powers to resolve *conflicts* among the courts of appeals. Petitioner's suggestion that the First Circuit's decision represents a departure from prior decisions of the Benefits Review Board is incorrect; but even if it had merit, such a conflict would not warrant the exercise of this Court's discretion to grant certiorari.

II. This Case Does Not Involve a Novel Question of Law and Turns on Its Own Facts.

The legal standard applied by the First Circuit is consistent with this court's decisions and the applicable legislation. The standards for awarding attorney's fees to "prevailing parties" under federal statutes were fully elaborated in *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983). The First Circuit's application of those standards to the statute involved in this case, which

requires "the successful prosecution of [a] claim" before attorney's fees and expenses can be awarded, is wholly consistent with the teaching in *Hensley*.

In *Hensley*, this Court addressed the appropriate result in cases—like this case—where a plaintiff presents distinctly different claims for relief that are based on different facts and legal theories. In that circumstance, the Court pointed out, "work on an unsuccessful claim cannot be deemed to have been 'expended in pursuit of the ultimate result achieved.' " *Id.* at 435. It was this principle that led the ALJ to deny attorney's fees for work expended on the Section 49 retaliatory discharge claim, and it was this principle that the First Circuit applied in reviewing the Board's decision.

Contrary to Petitioner's argument, the First Circuit did not rule that jointly filed claims of disability and retaliatory discharge under the Act can never be treated as related. The Court expressly rejected "any hard and fast rule," and noted that in some cases where the claims are adjudicated in a single hearing, fees "might be awarded without regard to the differential success of the claims." 848 F.2d at 326. The Court further observed, however, that where the ALJ can differentiate work performed on separate claims, "partial success should mean partial fees." *Id.* at 326.

In the end, the application of these principles must be left to the factfinder, a principle which the Board overlooked. *See* 33 U.S.C. §921(b)(3) ("The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole.") As this Court emphasized in *Hensley*, the factfinder's discretion should be broad in view of his "superior understanding of the litigation and the desirability of avoiding frequent appellate review of what are essentially factual matters." 461 U.S. at 437.

In the instant case, the First Circuit properly sustained the ALJ's factual finding that the claims were separate and dis-

tinct, noting that the "record manifests the separateness of the events and evidence at issue in the two claims." 848 F.2d at 326. Court noted that the ALJ had "methodically scrutinized" the total hours expended by petitioner's counsel, considered his estimate of what percentage of his time had been spent on the Section 49 claim, and identified and deducted particular expenses relating to that claim. In short, this case turns on its own facts and on the narrow scope of review of the ALJ's findings.

Petitioner incorrectly asserts that the First Circuit's decision conflicts with principles of statutory interpretation and fails to apply the plain and unambiguous language of the statute. Section 28(a) of the Act (33 U.S.C. §928(a)) provides that reasonable attorney's fees shall be paid by an employer only when "the person seeking benefits shall...have utilized the services of an attorney at law in *the successful prosecution of this claim*...." (Emphasis supplied.)

The legislative history of the Act confirms the requirement of a "successful prosecution" of a claim before attorney's fees can be awarded:

> H.R. 12006 amends section 28 of the Act to authorize assessment of legal fees against employers in cases where the existence or extent of liability is controverted and the claimant succeeds in establishing liability or obtaining increased compensation in formal proceedings or appeals. Attorney's fees may only be awarded against the employer where the claimant succeeds, and *the fees awarded are to be based on the amount by which the compensation payable is increased as a result of litigation*. Attorney's fees may not be assessed against employers (or carriers) in other cases.

1972 U.S. Code Cong. & Admin. News 4698, 4706. (Emphasis supplied.)

In this case, the First Circuit correctly ruled:

> The ALJ honored Congress' intention that fees should be awarded "based on the amount by which the compensation payable is increased as a result of litigation." The Section 49 claim did not increase respondent's compensation at all.

Other courts of appeals have affirmed the requirement of a "successful prosecution" of a claim before an attorney's fee can be awarded. *American Stevedores, Inc.* v. *Salzano*, 538 F.2d 933 (2nd Cir. 1976); *Atlantic and Gulf Stevedores* v. *Director, Office of Workers' Compensation Programs et al.*, 542 F.2d 602, 609-610 (3d Cir. 1976); *Presley* v. *Tinsley Maintenance Service*, 529 F.2d 433, 437 (5th Cir. 1976); and *Portland Stevedoring Company* v. *Director, OWCP*, 552 F.2d 293, 294 (9th Cir. 1977).

Finally, contrary to Petitioner's argument, the question presented in this case is not fundamental to "the constitutional protection against the deprivation of life, liberty, or property without due process of law." (Petition, p. 6) There is no constitutional guarantee of attorney's fees for a claimant alleging retaliatory discharge under Section 49, particularly when, after a full and fair hearing, that claimant's allegations have been found to be "completely devoid of merit."

Conclusion

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 88-451

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In the Supreme Court of the United States

OCTOBER TERM, 1988

PETER E. HORRIGAN, PETITIONER

v.

GENERAL DYNAMICS CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-451

PETER E. HORRIGAN, PETITIONER

v.

GENERAL DYNAMICS CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

Petitioner successfully prosecuted a claim for disability benefits under Section 8(c)(2) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 908(c)(2), but did not succeed on his separate and distinct discrimination claim under Section 49 of the LHWCA, 33 U.S.C. 948a. Petitioner contends that the court of appeals erred in limiting his attorney's fee award to those fees he incurred in litigating the claim upon which he had prevailed.

1. Petitioner worked as a crane operator for General Dynamics Corporation from September 1966 until October 16, 1980, when he injured his left knee and ankle (Pet. App. 2a). General Dynamics paid petitioner temporary total disability benefits from that date until Decem-

ber 13, 1981, when his physician issued a medical certificate indicating that petitioner was able to work without limitation (*id.* at 2a, 13a). Rather than returning to work for General Dynamics, however, petitioner began work as a rigger for a rival shipyard (*id.* at 2a). Three weeks later, after petitioner discovered that he was unable to perform rigger duties because of leg pain, he resigned and returned to General Dynamics (*id.* at 2a, 24a).

Upon his return, petitioner told General Dynamics' medical personnel that he had not returned to work immediately after his medical clearance because he had continued to experience difficulties with his leg (Pet. App. 3a, 24a-25a). He did not inform General Dynamics of his employment with the other shipyard, even though a medical questionnaire that petitioner completed asked whether he had worked since his injury (*id.* at 3a, 24a). Although petitioner anticipated that he would be disqualified from employment with General Dynamics because of his leg problem, he passed a physical examination and was returned to full duty work as a crane operator (*id.* at 2a). Shortly afterwards, General Dynamics discovered that petitioner had worked during December 1981 and had withheld that information (*id.* at 3a, 26a). On February 12, 1982, General Dynamics discharged petitioner for violating company work rules by falsifying the reason for his absence during the period between his medical clearance and reemployment and by withholding information regarding his December 1981 employment (*id.* at 3a, 27a). After his discharge, petitioner remained unemployed because of leg pain, with the exception of a three week period in which he unsuccessfully attempted to work as a rigger (*id.* at 3a).

2. On April 15, 1983, petitioner filed a claim for disability benefits under Section 8(c), 33 U.S.C. 908(c), of the

Longshoremen's and Harbor Workers' Compensation Act,[1] in which he sought benefits as of his discharge from General Dynamics for his disability (Pet. App. 3a). The same day, he filed a separate claim under Section 49 of the LHWCA, 33 U.S.C. 948a, alleging that General Dynamics discriminatorily discharged him because he had filed or threatened to file a disability claim (Pet. App. 3a).

After consolidating the two claims for hearing, an administrative law judge (ALJ) found petitioner permanently partially disabled and entitled to benefits under the LHWCA schedule on that basis (Pet. App. 28a-29a). However, the ALJ found that General Dynamics had not discriminated against petitioner when it discharged him since the sole reason for the discharge had been petitioner's violation of company rules (*id.* at 32a-33a).

When petitioner sought attorney's fees under Section 28(a) of the LHWCA, 33 U.S.C. 928(a), the ALJ determined that petitioner's counsel had reasonably expended 94.25 hours on the two claims (Pet. App. 42a). The ALJ reduced the compensable hours, however, holding that petitioner was not entitled to fees for work on the unsuccessful discrimination claim, which the ALJ noted was "completely devoid of merit" (*id.* at 38a-40a). The ALJ stressed (*id.* at 38a) the separate nature of the claims—one involving "the narrow issue pertaining to the nature and extent of disability," the other involving the allegation "that General Dynamics terminated [petitioner's] employment in 1982 because of his filing a claim for compensation"—and concluded (*id.* at 42a) that he should subtract

---

[1] The Longshoremen's and Harbor Workers' Compensation Act was amended in 1984 by the Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639, and retitled the Longshore and Harbor Workers' Compensation Act (33 U.S.C. (& Supp. IV) 901 *et seq.*).

from claimant's fee award compensation for that percentage of hours, which he estimated at 40%, that had been expended on the unsuccessful Section 49 claim.

3. On claimant's appeal, the Department of Labor's Benefits Review Board ruled (Pet. App. 15a-16a) that the ALJ had erred in reducing the fee award to reflect claimant's lack of success on the retaliation claim. The Board held (*ibid.*) that it is improper to "limit the fee only to work performed on issues on which claimant prevails" and noted (*id.* at 16a) that "[t]he Board has allowed an attorney's fee for work performed on an unsuccessful discrimination claim where claimant has prevailed in obtaining disability compensation." The Board concluded that "the fact that claimant did not prevail on the Section 49 claim in the instant case does not preclude a fee for work on that issue" and the Board consequently modified the award by eliminating the 40% reduction (*ibid.*).

4. Upon review, the court of appeals concluded that the Board erred in failing to differentiate between attorney's fees for work performed on unsuccessful issues and work performed on unsuccessful claims, and in adopting a presumption that the separate benefits and discrimination claims were sufficiently intertwined to award fees on both (Pet. App. 5a, 9a). The court thus denied enforcement of the Board's order and remanded with instructions to accept the findings of the ALJ (*id.* at 2a).

Noting (Pet. App. 6a) that it was "the first appellate court to reach the issue" whether a successful benefits claim and unsuccessful discrimination claim are sufficiently related that attorney's fees must be awarded under Section 28(a) of the LHWCA, 33 U.S.C. 928(a), for work performed on both claims, the court concluded that the legislative history of the LHWCA indicates that the amount of fees should be related to the claimant's success in increasing his compensation under the Act (Pet. App.

6a, citing H.R. Rep. 92-1441, 92d Cong., 2d Sess. [9] (1972)). Given that indication of intent, the Court declined to treat petitioner's partial success under the LHWCA any differently from the way similar success is treated under statutes authorizing fees to "prevailing parties." It thus found (Pet. App. 7a) appropriate the standards enunciated by this Court in *Hensley* v. *Eckerhart,* 461 U.S. 424, 435 (1983) which require that no fees be awarded for work done on unsuccessful claims that are unrelated to other claims successfully litigated in the same lawsuit. Disclaiming "any hard and fast rule with respect to jointly filed claims of disability and retaliatory discharge under the [LHWCA]" (Pet. App. 9a), the court concluded (*id.* at 10a) that the ALJ had properly "consider[ed] the particular claims in this case, and found them separate and distinct," and that the record supported the ALJ's findings and his correspondent reduction of the fee award by 40% (*id.* at 10a-11a). Accordingly, the court ruled (*ibid.*) that the ALJ had acted within his broad discretion as the fact-finder most familiar with the circumstances of the trial.

5. The court of appeals' holding does not conflict with any decision of this Court or any other court of appeals. Indeed, petitioner acknowledges that the court of appeals' decision resolves an "issue of first impression" (Pet. i) concerning attorney's fees under the LHWCA and that there is a "lack of case law at the appellate level" (Pet. 5) on the issue. Accordingly, review is unnecessary to resolve a conflict in the circuits.

Moreover, the court of appeals' decision is correct. Contrary to petitioner's contentions, the court of appeals did not hold that it is "proper under the [LHWCA] to limit attorney's fees and expenses only to work performed on *issues* in which the claimant prevails" (Pet. 4 (emphasis added)). Rather, as the court of appeals explained (Pet.

App. 5a, 9a), this case presents the question whether it is proper under the LHWCA to limit attorney's fees to compensation for "readily severable" *claims* on which a claimant prevails.

Section 28(a) of the LHWCA authorizes an award of fees to persons who "have utilized the services of an attorney at law in the successful prosecution of his claim * * *." 33 U.S.C. 928(a). The statutory language thus appears to link the availability of a fee award to success in prosecuting a particular claim. Also, as the court below recognized (Pet. App. 6a), the legislative history of Section 28(a) demonstrates that "[a]ttorneys fees may only be awarded against the employer where the claimant succeeds," and only to the extent that "the compensation payable [under the Act] is increased as the result of the litigation." H.R. Rep. 92-1441, 92d Cong., 2d Sess. 9 (1972). By this measure, petitioner was plainly not successful on his retaliation claim and not entitled to fees for the claim, since he lost on the merits and did not increase his compensation under the Act by virtue of litigating the claim.

Given Congress's evident desire that fees awarded correspond to success obtained, the lower court properly held (Pet. App. 7a) that there is no reason petitioner's LHWCA fee request should be treated differently from those of partially successful plaintiffs under statutes authorizing awards to "prevailing parties." According to this Court in *Hensley* v. *Eckerhart,* 461 U.S. at 440, to the extent that claims made by a prevailing party in a single lawsuit are unrelated, fees should only be awarded to compensate work on those claims that were successful. Further, in making the determination as to whether claims are sufficiently distinct to be separable for fee award purposes, the trier of fact has discretion appropriate to its "superior understanding of the litigation and the desirability of

avoiding frequent appellate review of what essentially are factual matters" (*id.* at 437). The court of appeals appropriately applied these standards to the facts of this case.[2] As it found (Pet. App. 10a), the ALJ did consider the particular claims in this case, and found them separate and distinct. The record supports that finding. The claim for disability centered on whether petitioner was disabled as the result of the October 1980 injury that occurred during his employment with General Dynamics. Pet. App. 10a, 37a-38a, 40a. On the other hand, petitioner's Section 49 discrimination claim focused on whether General Dynamics discharged him for retaliatory reasons in February, 1982, rather than for his violation of work rules as General Dynamics asserted (*ibid.*). On these facts, the court of appeals correctly concluded that the ALJ was within his discretion when he excluded fees for the unsuccessful discrimination claim.[3]

---

[2] As the court of appeals explains (Pet. App. 5a-6a), the Board erred in reading its own precedents to stand for a different approach according to which claims of disability and discrimination are *presumptively* interrelated. The earlier Board cases, *Nooner* v. *National Steel & Shipbuilding Co.*, 19 Ben. Rev. Bd. Serv. (MB) 43 (1986), and *Battle* v. *A.J. Ellis Construction Co.*, 16 Ben. Rev. Bd. Serv. (MB) 329 (1984), in which the Board affirmed ALJ fee awards, stand only for the proposition that an ALJ should not be *precluded* from granting fees on an unsuccessful claim where that claim is intertwined with a successful claim.

[3] Even if petitioner's separate claims had been related within the meaning of *Hensley*, 461 U.S. at 435-436, 440, in that they shared a "common core of facts or [were] based on related legal theories," it would nonetheless be appropriate under *Hensley* to reduce petitioner's fee award in light of his limited overall success in the litigation. Cf. *Avila* v. *Coca-Cola Co.*, 849 F.2d 511, 514-515 (11th Cir. 1988) (plaintiff's successful retaliation and unsuccessful national origin discrimination claims related, but plaintiff's attorney's fee award should be reduced because of plaintiff's limited success in lawsuit).

Finally, petitioner asserts that the decision below will discourage counsel from litigating LHWCA claims. But the fee award provision is designed only to compensate a claimant for attorney's fees incurred in the "successful prosecution of his claim * * * " (33 U.S.C. 928(a)). As long as a claimant's counsel receives compensation for work in furtherance of a successful prosecution of a claim, the congressional purpose underlying Section 928(a) is achieved. The court of appeals' holding does not transgress that principle.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

GEORGE R. SALEM
Solicitor of Labor

NOVEMBER 1988

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